

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

MARGARET DOE,

Appellant,

-against-

NO. 8

BLOOMBERG, L.P., ET AL.,

Defendants,

MICHAEL BLOOMBERG,

Respondent.

20 Eagle Street
Albany, New York
January 7, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

NIALL MACGIOLLABHUÍ, ESQ.
LAW OFFICE OF NIALL MACGIOLLABHUÍ
Attorney for Appellant
1450 Broadway, 39th Floor
New York, NY 10018

ELISE M. BLOOM, ESQ.
PROSKAUER ROSE LLP
Attorney for Respondent
Eleven Times Square
New York, NY 10036

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: We'll begin with appeal
2 number 8, Doe v. Bloomberg.

3 MR. MACGIOLLABHUÍ: Good afternoon, Your Honor.

4 CHIEF JUDGE DIFIORE: And let's wait - - - let's
5 wait a moment for your colleague to appear on the screen,
6 sir.

7 MR. MACGIOLLABHUÍ: Okay.

8 CHIEF JUDGE DIFIORE: Good afternoon. This is
9 appeal number 8, Doe v. Bloomberg.

10 Good afternoon, Counsel.

11 MR. MACGIOLLABHUÍ: Good afternoon, again, Your
12 Honor. And it may it please the court, Niall Macgiollabhuí
13 for plaintiff-appellant in this matter.

14 Your Honor, may I reserve two minutes for
15 rebuttal?

16 CHIEF JUDGE DIFIORE: Yes, of course, sir.

17 MR. MACGIOLLABHUÍ: Thank you.

18 Your Honor, the - - - the question before this
19 court is how to determine whether an individual qualifies
20 as an employer under the New York City Human Rights Law.
21 Now, as - - -

22 JUDGE FEINMAN: So - - - so that being the
23 question, do you read Patrowich to articulate the full test
24 for determining whether a corporate employee is an employer
25 under the City's HRL?



1 MR. MACGIOLLABHUÍ: Well, I mean, it's fair to
2 say that that has been an open question pretty much since
3 the time that the case was decided. And certainly, if - -
4 - if you look at the approach from the minority in the
5 Appellate Division, the analysis they subjected the Human
6 Rights Law to, in regard to Patrowich was, whether the
7 interpretation of employer, using the Patrowich definition,
8 was reasonably possible, in light the instructions that
9 favor plaintiffs.

10 So I believe that the question is, was that a
11 reasonably possible construction? And I think, certainly
12 for the Appellate Division, considering that Patrowich is
13 the law, I think it was a reasonably possible construction.
14 I don't know necessarily that it's the only construction,
15 and certainly, plaintiff has offered an alternative, but I
16 think in terms of the alternative, the question then would
17 become, while it doesn't go as far as Patrowich, in and of
18 itself, the question would be, does it go far enough.
19 Meaning, the instruction is always that it has to be
20 construed as far as reasonably possible, in favor of the -
21 - -

22 JUDGE FEINMAN: And so what do you think is the
23 test or the rule that we should adopt for the definition of
24 an employer under the City's HRL?

25 MR. MACGIOLLABHUÍ: Well, the test - - - the



1 test, Your Honor, that plaintiff has proposed is the - - -
2 the economic reality test, derived from the Second Circuit
3 decision, the Irizarry decision. I mean, we - - - we
4 think, and we would submit, that that is an appropriate
5 test here, but again, to return to the point I made a few
6 moments ago, the question would still remain, does it go
7 far enough?

8 And we would submit that that particular test is,
9 as it were, a middle grounds. But the City Council, and it
10 has repeated this instruction over the years to courts,
11 that interpretations over the years have not gone far
12 enough. And while, certainly, we would present - - -

13 JUDGE GARCIA: Excuse me, may I? May I?

14 CHIEF JUDGE DIFIORE: So let me ask this
15 question, Counsel. So where - - - where is the language in
16 the City Human Rights Law that supports the position that
17 corporate shareholders were intended to be held strictly
18 liable as employers for unlawful discriminatory acts of
19 their - - - of corporate employees? Where - - - where - -
20 - where do we find - - - where is that?

21 MR. MACGIOLLABHUÍ: It's not there, Your Honor.
22 I mean, the language is not there, but what I would say is
23 this. Obviously, what the City Council - - -

24 CHIEF JUDGE DIFIORE: Can we divine the intent?

25 MR. MACGIOLLABHUÍ: Yeah, well, the point I would



1 make is that the City Council obviously amended the law
2 back in 1991 to make employers strictly liable. Now, at
3 that time, it didn't define what a - - - an employer is.
4 Nonetheless, at the time it amended the statute, Patrowich
5 was the law in terms of how to define an employer.

6 JUDGE GARCIA: Can - - -

7 JUDGE FAHEY: You know, does - - - I'm sorry,
8 Judge. Is it all right if I - - -

9 CHIEF JUDGE DIFIORE: Please - - -

10 JUDGE FAHEY: - - - go ahead? Yes.

11 CHIEF JUDGE DIFIORE: Judge Fahey.

12 JUDGE FAHEY: The way I understand Patrowich is
13 that it's a two-part court test. One part says if it - - -
14 somebody's an employer if they have an ownership interest,
15 or somebody's an employer if they have the power to do more
16 than just carry out others' decisions. Do you agree with
17 that?

18 MR. MACGIOLLABHUÍ: Yes.

19 JUDGE FAHEY: Is that the way you read it?

20 MR. MACGIOLLABHUÍ: It is, Your Honor.

21 JUDGE FAHEY: In some ways, I think those - - -
22 those two definitions seem to be contradictory to each
23 other. Of course, someone can have an ownership interest
24 and within the context of the organization, it's quite
25 common, to really have no more power than to do a - - -



1 than to carry out other supervisors' decisions. People own
2 stock in companies, and what - - - what I'm concerned with
3 is the contradictory nature of that test, in and of itself.

4 And then secondly, the - - - I have a hard time
5 getting my mind around a reading of modern corporate
6 structures that allows anyone who is essentially a
7 shareholder to be dealt with as - - - as if they're an
8 employer on a day-to-day basis. It seems to be a - - -
9 such an enormously broad test that it has no limitation in
10 our modern economic reality.

11 MR. MACGIOLLABHUÍ: Yes, Your Honor. Well, Your
12 Honor, as it happens, and as I hope plaintiff made clear in
13 her papers, we tend to agree with that.

14 JUDGE FAHEY: Um-hum.

15 MR. MACGIOLLABHUÍ: I think for the Appellate
16 Division, Patrowich was - - - is and was the law when it
17 made its decision. We certainly have argued that if you
18 inquire deeper into the origins of Patrowich, it was in - -
19 - in terms of how it framed the test or expressed the test,
20 it was referring to the economic reality test as it had
21 been articulated or developed at that particular time.

22 So it refers to a number of cases, or cites a
23 number of cases, where the economic reality test was
24 applied in the context of FLSA cases. It also referred to
25 at least one case where it was applied in the context of



1 the ADEA. Now, obviously, the law has changed on the
2 federal level in regard to that statute, but I think the
3 point is well made, and we certainly would tend to agree
4 with it.

5 JUDGE FAHEY: Well, one of the problems is - - -
6 with Irizarry is, is I thought that was an FLSA case.

7 MR. MACGIOLLABHUÍ: Right.

8 JUDGE FAHEY: And it had certain statutory
9 requirements that would be different from anything that we
10 would do here because I think here, we're implicating a
11 common law interpretation of what we mean by liberal
12 interpretation and what the statute means by employer. And
13 it's a somewhat different setting, I guess, so applying
14 that here, I'm having some difficulty with that. Tell me
15 how you - - - how you get through that.

16 MR. MACGIOLLABHUÍ: Well, I - - - what I would
17 say to that, Your Honor, is that obviously, certain FLSA-
18 specific factors have been developed over the years. I - -
19 - I think the - - - the test is a broader test. Meaning,
20 it's not - - - the test, in and of itself, is not confined
21 to one particular statute. And I think if you look across
22 other statutes and other areas of employment law, there are
23 various tests that have been developed to identify
24 employers. And they are used interchangeably across
25 different statutes.



1 Now, of course, here, with the FLSA, it's a very
2 specific statute, and there are specific factors that have
3 developed to apply to it. I don't think those factors are
4 necessarily appropriate with regard to the New York City
5 Human Rights Law, but I think that it would be possible to
6 develop factors that would apply in - - - in this case, in
7 the same way.

8 I think the principle is a sound principle, in
9 that - - - and again, we have expressed it in quite general
10 terms, which is that if an individual has operational
11 control over the way in which a company interacts with its
12 employees, we believe that the employer - - - the
13 individual in that case is properly held liable. And we
14 certainly think that that is what the City Council has
15 constructed in terms of how the terms should be
16 interpreted.

17 JUDGE RIVERA: If I may ask a - - - a question,
18 Judge?

19 CHIEF JUDGE DIFIORE: Rivera.

20 JUDGE RIVERA: Thank you so much.

21 Counsel, I just - - - I want to follow up on this
22 from a different - - - for sort of - - - from a different
23 angle. I guess, the difficulty I'm having is that there's
24 certainly a whole line of case law exploring the issue of a
25 supervisor's liability, when the supervisor is nothing but



1 a supervisor, but did not themselves participate in the
2 conduct that - - - that the complainant, the plaintiff, is
3 alleging is violative of whatever anti-discrimination
4 employment statute they're referring to.

5 But here, and you can correct me if I'm wrong,
6 as I understand this complaint, yes, of course, you're
7 arguing that he fits, at a minimum, under some version of -
8 - - of the way we might read Patrowich, but you're also
9 arguing that Michael Bloomberg is responsible for having
10 set that culture in place, that, indeed, he really is
11 responsible for the opportunity and the environment that
12 allows for this kind of conduct to be encouraged, to have
13 occurred, and to not be disciplined, which strikes me as
14 somewhat different, right.

15 It - - - it strikes me that the complaint is
16 really going on about his own conduct, not merely as - - -
17 as a shareholder who might have some control. I mean,
18 after all, the business is Bloomberg. He built the
19 business. He's been very public about the fact that it is
20 his company. So as I understood the complaint, it is
21 really in many ways also about what he has done.

22 So if you could perhaps address how that might
23 inform the rule you're proposing, and the way we might want
24 to think about what the Council had in mind with respect to
25 who should be strictly liable and who's covered by this



1 statute.

2 MR. MACGIOLLABHUÍ: Yes. And I - - - Your Honor,
3 I would agree with pretty much everything that Your Honor
4 has just said. This - - - Mr. Bloomberg, in this case, is
5 not somebody who is a defendant in this case simply because
6 he holds a particular title or simply because he owns a
7 certain amount of stock in the company. He's in this case
8 because of what he did.

9 Now, in terms of what - - - what we don't dispute
10 is that he did not personally harass plaintiff in this
11 case. And that's - - - there's no suggestion to that
12 effect. And I would suggest to the court that this issue
13 was raised with him, and again, it's - - - it's beyond the
14 record, but it is a matter of public record, quite recently
15 in the context of the democratic primaries, where his
16 defense essentially was, you know, I didn't harass anybody;
17 I may have made certain comments. And I think that kind of
18 behavior is no longer good enough. It certainly wasn't
19 good enough in the context in which he offered his defense,
20 and we don't think it's good enough here either.

21 And I think that in terms of a company's culture,
22 certainly, Mr. Bloomberg over the years has received many
23 plaudits, and taken much credit for the culture he has
24 installed at - - - within his company. And there are
25 positive aspects to it; there's no question of that. But



1 there are also negative aspects to it, and this is one of
2 them, and we certainly think that he should be held
3 responsible.

4 Now, that does not mean, ultimately end of - - -
5 at the end of this case that he will be found responsible,
6 but at this juncture, he does have a case to answer. We -
7 - - we certainly believe that. And again, the point being,
8 he's not here simply because of his title, or simply
9 because he owns stock, and I think that is a legitimate
10 concern. Again, if you take the proverbial one percent
11 owner of stock, I think there were would be a real issue
12 for someone like that to be made a defendant in a case, but
13 I don't - - -

14 JUDGE WILSON: Chief - - -

15 JUDGE RIVERA: Well, plaintiff - - -

16 JUDGE WILSON: May I - - -

17 JUDGE RIVERA: Just - - - just to follow up;
18 excuse me - - -

19 JUDGE WILSON: Yes, of course.

20 JUDGE RIVERA: - - - if I may, just to follow up.
21 I just want to be clear. Of course, plaintiff did not sue
22 any other shareholder, correct?

23 MR. MACGIOLLABHUÍ: No.

24 JUDGE RIVERA: And didn't make any other claim
25 that any other shareholder had set that culture and so



1 forth, correct?

2 MR. MACGIOLLABHUÍ: Absolutely not. Absolutely
3 not.

4 JUDGE RIVERA: Okay.

5 MR. MACGIOLLABHUÍ: And the only - - - the only
6 reason Mr. Bloomberg was sued was because of what he
7 personally has done.

8 JUDGE RIVERA: Okay. And then -- so then this is
9 - - -

10 MR. MACGIOLLABHUÍ: I mean, the culture he
11 created.

12 JUDGE RIVERA: - - - this is my - - - my other
13 question. Given the way you've now clarified sort of how
14 he is a defendant, and what the allegations are as he is a
15 defendant, what's the policy that would be furthered - - -
16 beyond the general policy of, right, anti-discrimination
17 law and the City Council, as you've correctly said, and as
18 the court have said over and over, a broad expansive
19 reading of the City's Human Rights Law? What's the public
20 policy that's furthered by saying that this particular
21 defendant, given these allegations, is properly considered
22 liable under - - - under the statute?

23 MR. MACGIOLLABHUÍ: Well, Your Honor, I think
24 accountability matters. And I think the accountability of
25 the people who sit at the top of organizations and set the



1 tone and set the example matters. And I certainly think it
2 furthers the policy of the City Council not simply to hold
3 lower-level supervisors liable for their conduct. I mean,
4 obviously, they should be held liable. But there shouldn't
5 a - - - a cutoff, as it were, that if you're elevated
6 enough within a corporate hierarchy, therefore, you're
7 insulated from liability as a result of your own conduct.

8 JUDGE STEIN: Judge, may I ask a question?

9 CHIEF JUDGE DIFIORE: Judge Stein.

10 JUDGE STEIN: Counsel, but I - - - I guess what I
11 don't understand is how that adds to the corporate
12 responsibility. So whether Mr. Bloomberg himself is
13 personally liable for creating a culture, that doesn't - -
14 - it seems to me - - - when you're talking about
15 incentivizing or disincentivizing conduct, if the
16 corporation is ultimately going to be liable for that
17 conduct, what does it add to have the individual
18 responsible in terms of, really, anything?

19 MR. MACGIOLLABHUÍ: Well, Your Honor, what I
20 would say is, obviously, in the eyes of the law, a
21 corporation is a separate personality, a separate entity.
22 But I think the reality is that a company, a corporation,
23 is its people. And to the extent that I would not suggest
24 that holding somebody such as Mr. Bloomberg personally
25 responsible or personally liable is the only incentive for



1 a company to accord its behavior and the behavior of its
2 employees with the law.

3 But I think it's a particularly strong incentive
4 where those that have the power to set policies, set the
5 culture within a company, know that if they don't do what
6 they're supposed to do according to the law, that it's not
7 simply that the company will be held liable, but that they
8 may be held personally liable. I think that is a
9 particularly strong incentive.

10 And again, to compare with the FLSA, certainly,
11 once more, we would accept it's a quite different statute,
12 but I think if - - - if you look at it from a purposeful
13 point of view, the reason you have individual liability
14 there is that, and the determination has been made by the
15 courts, that the purpose sought to be served by the
16 legislation is furthered by individual liability and
17 individual accountability.

18 JUDGE STEIN: Well, let me ask you a question.
19 If - - - if you're looking for personal accountability,
20 aren't there other provisions in the City Human Rights Law
21 that would create that, that - - - that aren't based on
22 vicarious liability? So isn't that accountability already
23 there? If, as you say, this is based on his conduct in
24 this, then isn't that covered already in the statute
25 without adding vicarious liability?



1 MR. MACGIOLLABHUÍ: Well, it does not appear as
2 those particular provisions have been interpreted that that
3 would be the case. They all require personal participation
4 in the - - - the offending conduct. And in this case, we
5 don't have personal participation - - -

6 JUDGE STEIN: Well, for - - - so vicarious
7 liability, yes, but - - - but might - - - might it not be
8 considered, for example, aiding and abetting, or something
9 of that nature - - -

10 MR. MACGIOLLABHUÍ: Yes, well - - -

11 JUDGE STEIN: - - - by it could - - - by it
12 creating the culture and then - - - and then - - - then you
13 might have liability, but it's not based on what the other
14 person did per se.

15 MR. MACGIOLLABHUÍ: I agree, Your Honor, except
16 that the - - - that particular provision, the aiding-and-
17 abetting provision, has been, and without exception,
18 interpreted to require personal participation.

19 JUDGE WILSON: Chief, if I might?

20 CHIEF JUDGE DIFIORE: Yes, Judge Wilson.

21 JUDGE WILSON: Counsel, would, in your view,
22 would the complaint be sufficient if it omitted all of the
23 allegations having to do with Mr. Bloomberg's conduct and
24 left only the ones having to do with his status?

25 MR. MACGIOLLABHUÍ: Your Honor, would you mind



1 repeating the question? I'm not sure that I fully
2 understood it.

3 JUDGE WILSON: Sure. We've been talking about
4 all - - - Judge Rivera raised that the complaint has a lot
5 of allegations in it about Mr. Bloomberg's conduct in
6 setting a toxic environment and so on. It also has
7 allegations that Mr. Bloomberg is the owner of the company
8 and so on. If we omitted all of the former and retained
9 the latter, would the complaint still be sufficient?

10 MR. MACGIOLLABHUÍ: That is difficult to say, in
11 that - - - well, it certainly would be sufficient under the
12 - - - the - - - the bare, as it were, Patrowich test and it
13 would be sufficient.

14 If something more is required, meaning if the - -
15 - the elements set forth in Patrowich are necessary, but
16 not sufficient, and something more is required, I think,
17 and again, the test we have proposed is the one from the
18 Irizarry, that one would need to show that he has control
19 over the company in such a way that it affected the terms
20 and conditions of plaintiff's employment. So there would
21 need to be something within the complaint addressing that.

22 Now, that, I think, however, is a separate issue
23 from culture. And - - - and we have alleged in the
24 complaint that he was directly involved in employment-
25 related and, in particular, discrimination-related



1 decisions within the company. So I think that allegation
2 alone would suffice without the allegations as to the
3 culture he created.

4 JUDGE FAHEY: I think - - -

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 JUDGE FAHEY: Can - - - can I ask - - -

7 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

8 JUDGE FAHEY: - - - just one question of counsel?

9 CHIEF JUDGE DIFIORE: Yes, of course.

10 JUDGE FAHEY: A short one. The way I read the
11 Human Rights Law is that it requires that its provisions be
12 construed liberally. I think the language it uses is that
13 it requires "an independent legal - - - liberal
14 construction in all circumstances." So listen, my
15 understanding of what's liberal changes from time to time,
16 and it historically changes in our own life. It changes
17 from century to century. And what's your understanding of
18 what that means as to how we should construe this statute?

19 MR. MACGIOLLABHUÍ: To - - - to put it bluntly,
20 if - - - if it's good enough for an individual employer to
21 be held liable because employees are not paid their full
22 wages, it's certainly good enough for an individual
23 employer, such as Mr. Bloomberg, to be held liable in this
24 case.

25 JUDGE FAHEY: I - - - I don't - - - I don't



1 understand what that means. How does that tell us what a
2 liberal construction is?

3 MR. MACGIOLLABHUÍ: Well, it - - - liberal
4 construction is the - - - the - - - what the City Council
5 has asked for is that it be - - - liberal, as I understand
6 it, and as the City Council has instructed, is that it has
7 to be construed in favor of plaintiffs. Now, by definition
8 - - -

9 JUDGE FAHEY: So - - - so let me just stop you
10 there. So you're saying that the statutory construction
11 that's - - - that's being advocated here says that the
12 court should favor one side, as opposed to another, in a
13 litigation question?

14 MR. MACGIOLLABHUÍ: Well, I'm - - - I'm quoting
15 Your Honor from the Albunio case. And the language, and
16 I'll - - - I'll quote the exact language. It must be
17 construed "broadly in favor of discrimination plaintiffs,
18 to the extent reasonably possible."

19 JUDGE FAHEY: Um-hum.

20 MR. MACGIOLLABHUÍ: Now, that particular analysis
21 was enshrined subsequently in the Human Rights Law itself.
22 Now, I - - - I understand that - - - that the question Your
23 Honor asks is - - - which is, is the City Council asking
24 that one side be favored over another side, and the - - -
25 the simple answer is yes. I mean, that is what the statute

1 says.

2 JUDGE FAHEY: But wouldn't your argument be that
3 - - - that what you're asking for here is a deposition, and
4 that's a procedurally liberal - - - liberal approach but not
5 a substantively liberal approach as to the application or
6 the consequences of it.

7 MR. MACGIOLLABHUÍ: Yes, I mean, we - - - we - -
8 - I mean, certainly, a limitation with the record presented
9 to the court is that there has been no discovery.

10 JUDGE FAHEY: Um-hum.

11 MR. MACGIOLLABHUÍ: There has not been a
12 deposition. And - - -

13 JUDGE FAHEY: Right.

14 MR. MACGIOLLABHUÍ: And that does present a real
15 challenge to this court, and we would certainly argue that
16 at the least, the case should be allowed to continue with
17 Mr. Bloomberg as a defendant so that a record can be
18 developed, and again, at the very least, that would allow,
19 whether this court or another court, to better determine
20 whether he should be held liable as an individual.

21 JUDGE FAHEY: Final question. Am I - - - and I
22 may not be right about this. Am I right about the factual
23 part of the record, which is that during the time when the
24 petitioner here, the complainant, the plaintiff, worked for
25 the company, Mr. Bloomberg was mayor during that whole



1 time; is that correct?

2 MR. MACGIOLLABHUÍ: No, Your Honor.

3 JUDGE FAHEY: No? Okay.

4 MR. MACGIOLLABHUÍ: Only - - - only part of that
5 time.

6 JUDGE FAHEY: All right. Thank you.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MR. MACGIOLLABHUÍ: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel?

10 MS. BLOOM: Yes, Your Honor. And may it please
11 the court, my name is Elise Bloom and I am here
12 representing Mr. Bloomberg.

13 There's really one narrow issue before the court
14 today, and the issue is whether or not an individual owner
15 or a person with a high-level title can be held strictly
16 liable as an employer under Section 8-107(13) for the
17 conduct of another employee in the corporation that he or
18 she did not condone, encourage, approve, or even know
19 about.

20 The Appellate Division answered that question,
21 no. And we ask - - - we ask this court to affirm the
22 Appellate Division's decision and dismiss the complaint
23 against Mr. Bloomberg.

24 JUDGE GARCIA: Chief, may I ask a question?

25 JUDGE FEINMAN: Chief, may I ask a question?



1 CHIEF JUDGE DIFIORE: Judge Garcia.

2 JUDGE GARCIA: Counsel, I could maybe look at the
3 cases and the decisions below; you see the court's really
4 struggling to come up with a test here, and I think one of
5 the reasons is the City Human Rights Law is so unique in
6 terms of the liability imposed - - - it imposes. And I
7 think there are difficulties with each of those tests
8 because it's so unique in the terms of the strict
9 liability, particularly for an employer.

10 I read Patrowich somewhat differently and more
11 nuanced in terms of what that test that are people are
12 citing actually applied to. But with respect to your or
13 the majority's position below, it - - - it does seem, as
14 the dissent, I think, pointed out, difficult to have a
15 preliminary test for employer in a strict liability context
16 that contemplates some type of fault.

17 So before we get to whether or not you're
18 strictly liable, we have to determine if you participated
19 in the underlying offending conduct. It seems a difficult
20 test to apply.

21 MS. BLOOM: So Your Honor, I understand the
22 Appellate Division's - - - where - - - where the Appellate
23 Division landed, and I believe they landed in the right
24 place. However, I - - - under the express language of the
25 Human Rights Law, the City Council was very precise in



1 setting up those instances in which an individual can be
2 liable for his or her own - - - his or her own conduct.
3 And they were precise and they were explicit. And there
4 are three places in the City law, and this is - - -

5 JUDGE GARCIA: I understand that. I - - - I
6 understand this - - - the liability, and I think, again, in
7 terms of talking about conduct and culture, there were
8 aiding-and-abetting charges as I - - - you know, counts, as
9 I understand here, that aren't at issue on this appeal.

10 But just getting to the liability of an employer,
11 and the liability under that statute is broad, especially
12 that first prong, which says supervisor/manager strict
13 liability, it seems to me a difficult, logical argument to
14 make - - - and I'm not saying where you come out at the
15 end, but in terms of applying that majority test, we're
16 going to look at your participation and offending conduct,
17 in determining whether or not to get to the threshold issue
18 of whether or not you're strictly liable.

19 MS. BLOOM: I think it's two - - - there's two
20 different points. And the rule of law that we're
21 advocating is that for purposes of employer under 8-
22 107(13), that that provision, on its face, as construed and
23 harmonized with the other provisions in the New York City
24 Human Rights Law, does not provide that an individual owner
25 or executive can be vicariously liable as an employer for



1 the actions of another corporate employee.

2 I mean, to the extent that this court is inclined
3 to read into the definition of employer, a meaning that
4 might encompass an individual owner or executive of a
5 company, I mean the only reasonably possible construction
6 requires some level of personal culpability for the
7 specific conduct alleged by the plaintiff. And it - - -

8 JUDGE RIVERA: Judge, if I may ask? I just need
9 something to be clear - - -

10 CHIEF JUDGE DIFIORE: Judge Rivera.

11 JUDGE RIVERA: - - - for clarification purposes.
12 When you say an "individual owner", do you mean, like,
13 owner, as in the sense of a shareholder, because obviously,
14 the majority distinguishes a owner who's the - - - who's
15 the sole owner of their company. So is that the - - - just
16 to clarify?

17 MS. BLOOM: I'm sorry, if I was unclear on that
18 point. To the extent that it - - - we are talking about a
19 sole proprietorship, I believe that an individual, provided
20 that they have the requisite number of employees, would be
21 an employer.

22 But in this case, where you have a corporate
23 employer, who is a defendant in this case, and you have the
24 alleged wrongdoer, who is an - - - who is a defendant in
25 this case, the statute would - - - it does not provide for



1 individual liability for somebody simply because they are a
2 shareholder or they have - - - they hold a high level
3 within the company. I mean, the statute tells you when an
4 - - -

5 JUDGE RIVERA: What if - - - what if you've got a
6 business where you've got two partners, as opposed to the
7 sole owner proprietorship? Are they both liable, strictly
8 liable?

9 MS. BLOOM: I believe I - - - under the strict
10 reading of the statute, if they were - - - if they were
11 together the employer, potentially yes. But in terms of
12 the strict liability piece of it, I mean, I - - - I - - -
13 they would - - - they certainly could be liable under any
14 of the provisions of that provide for - - -

15 JUDGE RIVERA: So - - - so then if discovery
16 showed - - - there has not been any here, but if discovery
17 revealed that the defendant, Michael Bloomberg, is not an
18 ordinary shareholder in the sense we mean, you know, some
19 pension plan owns one share, you know, that he really
20 functions as the kind of employer that has a particular
21 level of control, would that change the analysis?

22 MS. BLOOM: There are no allegations in this case
23 which would support a conclusion that Mr. Bloomberg was
24 anyway involved in any of the acts that happened in this
25 case, and - - -



1 JUDGE RIVERA: Well, I'm not talking about the
2 acts. I understand your argument, and I - - - I think
3 counsel has conceded that, and said it over and over, that
4 that's part of the issue of why they've - - - they've
5 crafted their arguments in this way.

6 But I'm asking you if discovery revealed, in
7 fact, that as a shareholder, he - - - he - - - he can
8 really - - - he really functions, essentially, closer to,
9 if not a sole proprietor, right, owner, as an owner that's
10 on the level of partners, who have equal control and say in
11 how a business is run.

12 MS. BLOOM: It's our - - - it's our position that
13 based on the very, very detailed allegations in the
14 complaint, that it - - - that the only purpose of discovery
15 in this case would be to try to uncover some - - - some
16 fact and that that's not the purpose of discovery, that the
17 court has to take the allegations of the complaint as pled.
18 And as I said, in this case, the allegations are very, very
19 detailed - - -

20 JUDGE STEIN: May I ask a question?

21 JUDGE GARCIA: But Counsel, can I - - - can I
22 clarify - - -

23 CHIEF JUDGE DIFIORE: Judge Garcia.

24 JUDGE GARCIA: - - - a clarification a bit. I
25 think the - - - the question being, if you have a



1 partnership, right, a law partnership, is that really
2 different as an - - - as an entity? Because let's say it's
3 250 people in that partnership, but you have a managing
4 partner or a few managing partners. Is it - - - what would
5 your view - - - I mean, that's the corporate entity in that
6 case - - - what would your view of the liability of the
7 managing partner or partners be under your interpretation
8 of the City Human Rights Law?

9 MS. BLOOM: Under our interpretation of the City
10 Human Rights Law, the liability of an individual partner
11 would be determined under one of the three sections that
12 provides for individual liability for either engaging in
13 the act, aiding or abetting - - -

14 JUDGE GARCIA: Or retaliates.

15 MS. BLOOM: - - - or retaliating.

16 JUDGE GARCIA: Right.

17 MS. BLOOM: That there would be no basis to hold
18 that individual liable as an employer for purposes of
19 imposing vicarious liability.

20 JUDGE GARCIA: So it doesn't matter what the
21 corporate form is. If it's a corporate entity - - -

22 MS. BLOOM: That's correct, right.

23 JUDGE GARCIA: - - - the liability is with the
24 entity, and to - - - let's call it - - - and this isn't
25 what it is - - - but piercing the veil, or to get to an



1 individual because of their status in the entity, you need
2 some type of conduct making you liable under the
3 substantive provisions of the Human Rights Law. That's
4 your position.

5 MS. BLOOM: That's our position, and - - -

6 JUDGE STEIN: Can I - - - can I ask you to
7 clarify one other thing?

8 MS. BLOOM: Sure.

9 JUDGE STEIN: In this particular case, in the
10 complaint, there are allegations, and - - - and the
11 plaintiff is arguing that there are specific allegations
12 about Mr. Bloomberg's conduct. Are you saying that they
13 cannot go forward on those allegations or are you saying
14 that they are only - - - that they fail to say the cause of
15 action with respect to allegations only of vicarious
16 liability?

17 MS. BLOOM: We're - - - our position is that for
18 purposes of vicarious liability, under Section 8-107(13),
19 that they have failed to state a claim. And I would point
20 out that there had been an aiding-and-abetting claim that
21 had been brought against Mr. Bloomberg. That claim was
22 dismissed. That dismissal was never appealed. And if you
23 take a look at the allegations, these allegations of
24 alleged corporate culture, I mean, they really fall into
25 two categories, both of which are completely insufficient



1 to tie Mr. Bloomberg to anything that's alleged to have
2 happened in this case.

3 One category are some things that are
4 cherrypicked from media articles that pertain to things
5 that happened back in the '90s or the early 2000s, well
6 beyond the - - - well before the plaintiff ever joined the
7 company in 2012.

8 The other category refers to - - -

9 JUDGE RIVERA: Well, look - - - well, look,
10 Counsel, they may not be able to prove it. The question is
11 whether or not the complaint is sufficient to get them past
12 that threshold, right? And so if they're arguing that a
13 particular defendant has created an environment in which
14 the conduct alleged to be discriminatory is encouraged, not
15 disciplined, and expected, right - - - that's the sort of
16 the kind of argument they're - - - they're making. That
17 strikes me as different from saying, oh, no, they could
18 never show that, right. That - - - that's a different
19 question; that's a question of proof.

20 MS. BLOOM: But the question here is, accepting
21 what you - - - accepting your position, the question here
22 is, are the allegations that they've made sufficient to
23 even get them to that point? And they are not because if
24 you look at those allegations carefully, what you will see
25 is that there are a series of media articles that talk



1 about unrelated, old conduct. And I will point out, just
2 so - - - so the record's clear, there's some reference in
3 paragraph 34 of the complaint to 2015. It's wrong. It's
4 talking about an article from November 1st of 2005.
5 They've got a bunch of unrelated things from media articles
6 that happen - - -

7 JUDGE RIVERA: Well, Counsel, assuming - - -
8 assuming - - - I want to circle back to Judge Stein's
9 question. Assuming that the court disagreed about the
10 sufficiency of the allegations as a threshold matter, could
11 they then proceed on those allegations, not for purposes of
12 vicarious liability, but for - - - as an argument of his
13 own conduct, separate and apart from aiding and abetting,
14 not as an aider and abettor, but for his own (audio
15 interference)?

16 MS. BLOOM: I do not believe that the allegations
17 as stated in the complaint would allow them to provide - -
18 - to proceed under Section 8-107(1), which is the section
19 that says that an individual shall not - - - "it shall be
20 an unlawful discriminatory practice for any employee to
21 engage in any kind of discriminatory conduct." And I do
22 think it's worth mentioning that they have not brought such
23 a claim against Mr. Bloomberg and that they themselves
24 concede in - - - and they've conceded here today that he
25 had no involvement.



1 We have a corporate employer here who the
2 plaintiff alleges was her employer. We have the wrongdoer
3 here, who the plaintiff alleges was employed by the
4 corporate employer. The question we're talking about here
5 is the vicarious liability question. And that - - - I did
6 want to go back to some of the questions about Patrowich
7 for a moment because I do think that that's import - - -
8 it's important.

9 There are several things about the Patrowich case
10 that make it inapplicable here, starting with - - - the
11 question in the Patrowich case came up under the state law,
12 as opposed to the City law. And the - - - you know, this -
13 - - this issue with the state law is that the only way for
14 an individual to be liable for his or her own conduct is if
15 they are an employer.

16 And the problem in Patrowich, and the point that
17 gets overlooked time and time again, is that what the court
18 was looking at is they had the person who was the alleged
19 wrongdoer. And the question was, can we make that person
20 responsible for their own conduct under the City law - - -
21 under the state law.

22 And under the state law, the only way to do that
23 was to determine if they could be an employer. And so the
24 court was grappling with the question of, at what point - -
25 - how high up in the organization does that person have to



1 be to be responsible for their own conduct? And so that
2 was where the whole discussion could they be considered an
3 employer.

4 Under the City law has specific provisions for
5 individual liability. We're not talking about those
6 provisions here. Nobody's made - - - there - - - there was
7 a claim made under one of those provisions; that claim was
8 dismissed and not appealed. The question here is one of
9 vicarious liability.

10 And even if you look at the economic realities
11 test, and even if you go back to that Irizarry case, a Fair
12 Labor Standards Act case, if you look at the language in
13 that case, the court was very clear that it requires some
14 degree of individual involvement in the company that
15 affects the terms and conditions of the plaintiff's
16 employment. And the plaintiff here concedes that that is
17 not present with regard to Mr. Bloomberg.

18 JUDGE STEIN: Counsel, where - - -

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 JUDGE STEIN: - - - where, if at all, does
21 Griffin fit into this?

22 MS. BLOOM: So in terms of Griffin, and I assume
23 you're referring to the common law test, and how that might
24 apply to the definition of an employer. I think one of the
25 most important parts of Griffin, actually comes out of the



1 dissent in that case. And I say that, because in the
2 dissent, it was pointed out that, "We must give meaning to
3 every word when interpreting a statute, but we cannot add
4 words or interpret a statute in contradiction with the
5 legislature's express manifestations of its intent."

6 When you look at the City law, the City Council
7 was specific; these are the times that an individual can be
8 personally liable. The City law was also specific in terms
9 of the use of owners and managers because if you look at
10 the public accommodation provisions, you see that the - - -
11 that the statute specifically says an owner or a manager
12 can be responsible for discriminating in a public
13 accommodation context. That is completely different.
14 There is - - - in section - - - in the vicarious liability
15 section, it talks about employer only. And it says an
16 employer may be liable for the acts of its employee or an
17 agent.

18 JUDGE STEIN: So are you saying - - -

19 JUDGE FAHEY: You know - - -

20 JUDGE STEIN: So Griffin - - - the Griffin
21 factors have - - - have no relevance here? Is that your
22 position?

23 MS. BLOOM: I do not believe - - - I do not
24 believe that the Griffin factors inform an interpretation
25 of the City law, but to the extent that this court is



1 inclined to consider the Griffin factors, the Griffin
2 factors would support the dismissal of Mr. Bloomberg
3 because, again, they would require some degree of
4 participation in the underlying conduct, which is not - - -
5 which is not alleged to be present here.

6 JUDGE FAHEY: Judge, could - - - could I ask
7 another - - -

8 CHIEF JUDGE DIFIORE: Judge Fahey, um-hum.

9 JUDGE FAHEY: Could we - - - Ms. Blook - - -
10 Bloom, could we just stay on the - - - the Griffin test for
11 a second? The way I understand that case - - - it's a 2017
12 Court of Appeals case, I believe, that was referred by the
13 Second Circuit. The way I understand it is that the - - -
14 we adopted a common law test that said "the essential
15 element is the right of control." Would - - - would you
16 agree with that?

17 MS. BLOOM: I would say that is - - - that was
18 one of the four elements that the court adopted; that's
19 correct.

20 JUDGE FAHEY: So, if that's the case, why doesn't
21 the plaintiff get to ask the question of - - - of the - - -
22 of the employer here, or the chief executive officer of
23 whether or not he exercised any control or created a
24 hostile environment in some way?

25 MS. BLOOM: For two reasons, first going back to



1 the test in Griffin. The test in Griffin had four
2 components to it.

3 JUDGE FAHEY: Um-hum.

4 MS. BLOOM: The selection and engagement of the
5 servant. It's undisputed in this case, and alleged by
6 plaintiff, that she was hired by Bloomberg L.P. and
7 interviewed by the alleged wrongdoer, Nick Ferris.

8 The pay - - - the second, the payment of salary
9 or wages. There's no allegations whatsoever that Mr.
10 Bloomberg had anything to do with the payment of her salary
11 or wages.

12 The power of dismissal. She had no allegation
13 that he had anything to do with the terms and conditions,
14 her - - - her hiring or her dismissal, and then the fourth
15 factor that you point to, the power of control of the
16 servant's conduct. Again, there's no allegations in this
17 case, other than a reference to some media articles that
18 Mr. Bloomberg had controlled in any way any aspect of the
19 plaintiff's case. And I'll stop there.

20 So I believe that even if you were to apply the
21 Griffin factors, you take the allegations as pled in this
22 case, Mr. Bloomberg does not - - - under the clear language
23 of the City Rights Law - - - the City Human Rights Law, he
24 would not qualify - - - he would not be considered an
25 employer for purposes of imposing vicarious liability. And



1 to allow him to remain in this case simply because there
2 may be a possibility that the plaintiff could drudge
3 something up in discovery runs counter to every litigation
4 principle.

5 JUDGE RIVERA: Judge, if I may ask a question?

6 MS. BLOOM: Sure.

7 JUDGE RIVERA: How - - - well, I was asking the
8 Judge, okay.

9 MS. BLOOM: Sorry.

10 CHIEF JUDGE DIFIORE: Go ahead, Judge Rivera.

11 JUDGE RIVERA: Thank you.

12 So Counsel, let me just ask you this
13 hypothetical. Is - - - is Counsel still - - - yeah, there
14 you go. Let me ask you this hypothetical. Let's say you
15 have an employer who is the founder of a company and sets
16 as a practice that women shall not be appointed to
17 managerial positions, and then leaves the company but
18 retains shareholder control. Can that person be sued under
19 the City Human Rights Law for vicarious liability?

20 MS. BLOOM: I do not believe that that person
21 would be considered an employer for purposes of vicarious
22 liability under the City law. I believe that if you could
23 establish that that person in some way was involved in the
24 challenged employment conduct as to the individual
25 plaintiff, you could sue them as an individual.



1 JUDGE RIVERA: Well, I'm sorry; I wasn't clear.
2 I - - - the assumption in my hypothetical is that you have
3 a plaintiff who sues because they were not appointed to a
4 managerial position because they are female, based on their
5 sex.

6 MS. BLOOM: I think they could - - - I think if
7 you could establish a connection, more than just there is a
8 founder of a company at some point who set a practice, and
9 then at some point in the future, this is - - - this is
10 what happens, knowing - - - not even knowing whether the
11 per - - - the founder is there or not there - - - I do not
12 believe that those facts, in and of themselves - - -

13 JUDGE RIVERA: But in my hypothetical, I said
14 they - - - they then become a shareholder.

15 MS. BLOOM: I believe under your hypothetical,
16 that that individual would not be considered an employer
17 for purposes of Section 8-107(13), and that to the extent
18 there would - - - there could liability, that liability
19 would have to attach to one of the specific provisions,
20 that provide for some type of, at least, minimal
21 culpability.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 Counsel, you have your rebuttal.

24 MR. MACGIOLLABHUÍ: Yes, thank you, Your Honor.

25 Your Honor, to - - - to pick up on Judge Rivera's



1 hypothetical, Mr. Bloomberg's position here is that - - -
2 to take it one step further, if he set the particular
3 policy described in that women could not be appointed to
4 particular positions, but then somebody else within the
5 company applied it to an individual employee, Mr.
6 Bloomberg's position is that he could not be sued for that.
7 The only person who could be sued is the other individual
8 who applied the policy. The setting of the policy - - -
9 even for that person to remain a CEO, that the setting of
10 the policy alone would not be sufficient for liability;
11 it's only the person that applies it in the individual
12 case.

13 And I would - - - to make a broader point, I
14 think the difficulty here is that Patrowich obviously ruled
15 that individuals in certain circumstances, and obviously,
16 there's dispute as to what those circumstances are, can be
17 held liable as employers. And the City Council said that
18 employers are to held strictly liable for the conduct of
19 managers and supervisors.

20 Now, that is a difficult circle to square, but to
21 the extent that an employer or an individual such as Mr.
22 Bloomberg is not to be held strictly liable, that would
23 mean, in essence, overturning Patrowich - - - unless
24 Patrowich is to be confined purely to the State Human
25 Rights Law, and I don't think that is - - -



1 JUDGE RIVERA: Judge, if I may ask - - - if I may
2 ask a question, Judge? Let - - - let me just - - -

3 CHIEF JUDGE DIFIORE: Yes.

4 JUDGE RIVERA: - - - go on - - - on the way you
5 were trying to get to the hypothetical I posed, if - - - if
6 I was going to be on the - - - if I were going to try and
7 answer it from the defendant's side, given what you've
8 said, wouldn't your adversary's response be, well, they
9 first came up with that policy, but the reality is that the
10 corporate entity adopted the policy. That's the employer.
11 And at the time of termination, that's the proper
12 defendant, in addition to whoever otherwise aids and abets.
13 There could be another supervisor who aids and abets - - -
14 or someone else who aids and abets, and - - - and whoever
15 otherwise is responsible for actualizing and implementing
16 the policy.

17 But once, in my hypothetical, they've moved onto
18 shareholder status, they - - - the corporate entity is the
19 employer. Because I think that's what the majority was
20 struggling with: this corporate entity is your employer.
21 What might be your response to that?

22 MR. MACGIOLLABHUÍ: Yes. I mean, I - - - I do
23 understand the struggle as the court below had. And I
24 think it's a legitimate struggle. But I think that the - -
25 - the problem the - - - with the decision below is that it



1 - - - it essentially rewrote the statute. I mean, it took
2 a standard of liability that had been rejected explicitly
3 by the City Council and, as it were, brought it back in
4 through the back door in that - - - as a way to define an
5 employer. I think, as a starting point, in terms of the
6 present analysis, I don't think there's any serious dispute
7 that the majority below got it wrong for that reason.

8 Now, the challenge, of course, is where to draw
9 the line. And I think that certainly, the privilege - - -
10 and it's a privilege - - - we're not in Lochner territory.
11 It's not set in stone; it's not a Constitutional right
12 limited liability, but it is something that is, or should
13 be, properly considered in the context of the City Human
14 Rights Law. But the question is where you draw the line.

15 And to go back to my previous point - - -
16 considering that the City Human Rights - - - or the City
17 Council, I should say, have said that employers are
18 strictly for the conduct of managers and supervisors, the
19 only way to draw the line in the way that Mr. Bloomberg is
20 proposing is to say that individuals cannot be considered
21 to be employers in that the City context and that they can
22 only be considered as employers in the context of the State
23 Human Rights Law, and I don't think that's an attainable
24 conclusion here.

25 And I would say as well, in terms of another



1 point that has been made in terms of Griffin v. Sirva, and
2 the test there. And, you know, the essential element
3 there, as with the Irizarry case, as with most of the tests
4 that have been crafted, is that of control. Now - - - and
5 it's not simple about a media control. And I think that is
6 an important theme that when courts look at personal
7 participation, they're looking at an immediate connection
8 between the plaintiff or the victim and the defendant that
9 we don't have here. We don't have that immediate
10 connection between Mr. Bloomberg and the plaintiff here.

11 But that alone, the fact that the connection is
12 not immediate, that the control is not immediate, should
13 not suffice to insulate him from liability. Essentially,
14 what you're doing is that you're pinning all the blame on
15 lower-level employees, lower-level supervisors, and you're
16 insulating the people at the top, the people who set the
17 course for companies, whether it's by way of setting
18 policies or establishing cultures, for liability.

19 And I do not think that that accords with what
20 the City Council has asked for in terms of its vision of
21 the justice that discrimination plaintiffs are entitled to.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 MR. MACGIOLLABHUÍ: Thank you, Your Honor.

24 (Court is adjourned)

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Margaret Doe v. Bloomberg, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: January 17, 2021

